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Policy-Oriented World Power Process*

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For Myres McDougal, as well as for myself, merely ideologically or technically oriented elaborations of international law are jejune and even misleading for the expansion of knowledge; and mere power-political elaborations are evasive of the *raison d'être* of international law.¹ McDougal's focus on "policy-orientation," on values of goals of human beings such as respect, enlightenment, wealth, well-being, skill, affection, rectitude, and sincerity as pursued in "the world power process," is a natural projection of his view of Western municipal legal orders. It shares with my work of the 1950s the conviction that as soon as we seek to give an account of international law in terms of its sociological substratum, we must study international law not merely in relation to territorial state entities but also, and finally, in relation to the human beings constituting the populations of these entities.

While for myself the above truths are the basis of sociological description or ethical criticism of international law, McDougal's infer-

* The Hastings International and Comparative Law Review is indebted to Professor Julius Stone and The Johns Hopkins University Press for permission to reprint here Chapter 4 of Professor Stone's just released book, *Visions of World Order: Between State Power and Human Justice* (Johns Hopkins University Press, 1984).

1. Cf. M.S. McDougal, "International Law, Power, and Policy: A Contemporary Conception," *Hague Recueil* 82 (1953): 137-252, esp. 143-60, 190-91. McDougal enumerates five tasks of "policy-relevance" (197), namely: (1) clarification of goals of decision; (2) description of trends as to goals; (3) description of conditions affecting past decisions; (4) projection of future movements given no intervention; and (5) recommendation of the jurisprudence as to strategies, etc., to realize "preferred goals." Insofar as, for that matter, the inquirer himself "postulates" the goals, both tasks (1) and (5) pertain in the present view to the field of justice within the field of jurisprudence. But, of course, McDougal wishes his observer not only to discover and describe facts, etc., but also to be free to postulate goals and prefer one to another (see below, n.9 and text preceding n.38). The effects of this takeover will appear below. On my general positions see J. Stone, *Legal Controls of International Conflict* (Sydney, London, and New York, 1954; supp., Sydney and New York, 1959), esp. xxxi-lv, 1-25; idem, "Problems Confronting Sociological Enquiries concerning International Law," *Hague Recueil* 89 (1956): 63-180, hereinafter cited as Stone, "Sociological Enquiries"; and idem, "International Law and International Society," *Canadian Bar Review* 30 (1952): 164-74, esp. 166-67, 174.

ence from them is more radical. For him the study of the human substratum is part of the process of actualization of international law, not merely of sociological description or ethical criticism of it. In either view, such description and criticism are salutary in widening the horizons of lawyers. But when law is collapsed (or inflated) into such description and criticism, so that intellectual study of world affairs is not distinguishable from the operations of national or international authorities inquiring whether particular conduct is lawful or unlawful, many confusions are liable to follow. These include McDougal's own vacillations as to whether his approach should be described as the sociology of law or something else.² They flow basically from the fact that such merger surrenders any identity of law to an all-embracing global environment and the emerging and changing goals sought within it. Just because at points of stress the application of international law may require reference to the environment and goals, international law does not have to be merged indistinguishably into them.³ The present im-

2. M.S. McDougal, H.D. Lasswell, and W.M. Reisman, "Theories about International Law: Prologue to a Configurative Jurisprudence," *Virginia Journal of International Law* 8 (1967-68): 188-299, esp. 194-98, 260-61, 270-75, hereinafter cited as McDougal, Lasswell, and Reisman, "Theories," is concerned to insist that what McDougal calls his "configurative jurisprudence" of international law covers not only what are here called sociological inquiries but also inquiries as to justice in the international community. His jurisprudence studies "the interrelations of law and community process," involving contextual and problem-oriented work, by whatever methods are appropriate to this aspect of the subject (195-97). It must also, however, be policy-oriented, and he is critical, for example, of R.A. Falk, P.E. Corbett, and myself for not dealing with ends or goals (260-61, 270-75, 288). On the uncertainties of these McDougal positions see O.R. Young, "International Law and Social Science: The Contributions of Myres S. McDougal," *American Journal of International Law* 66 (1972): 62.

Denial that criteria of justice for evaluating policies can be separately considered ignores longstanding work. See, for example, J. Stone, *The Province and Function of Law* (Sydney and London, 1946), passim, esp. chap. 1; idem, *Human Law and Human Justice* (Sydney, London, and Stanford, 1965; reprint, 1968); idem, "Approaches to the Notion of International Justice," in *The Future of the International Legal Order*, ed. R.A. Falk and C.E. Black, 4 vols. (Princeton: Princeton University Press, 1969-72), 1:372-460. Topics relevant here that are dealt with there include: the role of natural law and conscience (380-403), equivocations of equality of nations (403-24), state and human beings as claimants to justice (430-37), the blocking and distorting role of the state (437-52), and obstacles to redistribution (452-60) (see below, chaps. 6, 8, and 9).

3. R.A. Falk, who is far from being a traditional international lawyer, repeatedly returns to the point in "The Relevance of Political Context to the Nature and Function of International Law: An Intermediate View," in *The Relevance of International Law: Essays in Honor of Leo Gross*, ed. K. Deutsch and S. Hoffman (Cambridge, Mass.: Schenkman, 1968), 140-41, 150, 151. He states pithily that we should "conjoin law to politics without collapsing one into the other" (144). Social scientists have indeed charged that McDougal's definition of law in terms of effective authoritative decisions on the distribution of values in society covers all aspects of society, so that by definition law's relation to society cannot be studied,

portance of this matter, however, is that insofar as McDougal's "configurative" jurisprudence of international law includes by its terms the whole range of data for sociological inquiry, it is appropriate to examine it as part of the sociological perspectives of the 1980s.

According to this view, precepts are "law" when they are "expressions of community expectations," and international law is what emerges from a process⁴ of decision making in accordance with such expectations. Conformity with such expectations is demanded by the basic value of human dignity and is implicit in the majority principle adopted in some form by Western democracies. As a fervent though not uncritical disciple of McDougal and Lasswell has recently restated this principle:

. . . if the dignity and worth of individuals are to be equal, then the expectations of each individual must be accorded equal weight in the measurement of authority. An equality of weight, in fact, compels recognition of the import of generally shared expectations among the participants of a community—all of the participants of a community. Patterns of generally shared legal expectations that are shaped by both majority and minority preferences, I would argue, are the most

since it is already settled by definition (see Young, "International Law and Social Science," 65 ff. Cf., for example, the conception of political science in D. Easton, *The Political System* [New York: Knopf, 1953], chap. 5).

Of course, the fault of collapsing law into politics and sociology is indulged also by others. It is virtually a keynote of J. Fawcett's *Law and Power in International Relations* (1982). See esp. pp. 37-39, where he finds it unnecessary to invoke either the basic norm or any other criterion for recognizing international law. Rather, "international legal order is a matter of fact, not of theory or principle" (37). It exists because "the formation and observance of certain rules or standards, both nationally and in international relations, meet in fact certain political, social or economic needs of nation-states." But this simply ignores that predictability which requires the practitioner (whom Fawcett has earlier distinguished from the political or juristic observer) to find rules without examining the whole range of contemporary, political, social, and economic phenomena bearing on international relations. With Fawcett, too, though the McDougal frame is not explicitly invoked, this collapse is covered by presenting "law as process," of which the purposes may range from consultation to management, with structures ranging from ad hoc conference to standing organizations; by methods ranging from negotiation to mandatory decision; and by recommendations, decisions, and regimes.

4. The "process" notion thus straddling international law and "the world power process" is a veritable ambush against adversaries. See, for example, the thesis in M.S. McDougal and W.M. Reisman, "The Changing Structure of International Law: Unchanging Theory for Enquiry," *Columbia Law Review* 65 (1965): 810-18, hereinafter cited as McDougal and Reisman, "Unchanging Theory," purporting to dispose in one sweep of some of the lamented W.G. Friedmann's work by pointing out that the law is "process," not "rules." Therefore, for example, the *non liquet* problem does not exist! Cf. the later version by the same authors with H.D. Lasswell, "The World Constitutive Process of Authoritative Decision," in Falk and Black, *Future of the International Legal Order*, 1:73-154.

useful and objective (even principled, but certainly not neutral) guides for a decisionmaker to follow if one is concerned about democracy, human dignity, and a process of self-determination that involves participation by each individual member of the community.⁵

Doctrines thus summarized permeate McDougal's writings on municipal constitutional law and jurisprudence,⁶ his writings on particular fields of international law,⁷ and his Hague lectures on international law, power, and policy.⁸

The hazards of McDougal's transposition from the municipal to the international sphere begin at the point of the relation of "law" to prevailing human expectations. Whether a particular notion or method can be thus transposed is a question that may be answerable after the appropriate sociological inquiries. To assume that they are thus transposable at the outset of such inquiries is to block the inquiries *ab limine* by begging the main question. It is clear, for example, that McDougal, in his 1953 Hague lectures, transferred to the international level a group of concepts originally devised for operation on the municipal level, without adequately checking their aptness for the different conditions on the international level. This is clearly true of the postulated goals, of which a version for the municipal context is found as early as 1943.⁹ It is also true, with consequences still more hazardous, of the assumed role of the "decisionmakers" which inspires the whole approach.¹⁰

5. See J.J. Paust, "The Concept of Norm: Towards a Better Understanding," *Temple Law Quarterly* 53 (1980): 226-90.

6. See M.S. McDougal, "Jurisprudence for a Free Society," *Georgia Law Review* 1 (1966): 5; H.D. Lasswell and M.S. McDougal, "Trends in Theories about Law: Comprehensiveness in Conception of Constitutive Process," *George Washington Law Review* 4 (1972): 7.

7. See M.S. McDougal and F.P. Feliciano, *Studies in World Public Order* (New Haven: Yale University Press, 1960), 295 and passim; M.S. McDougal et al., *The Interpretation of Agreements and World Public Order* (New Haven: Yale University Press, 1967), of which see the critique in R.A. Falk, "On Treaty Interpretation and the New Haven Approach," *Virginia Journal of International Law* 8 (1968): 322-55.

8. McDougal, "International, Law, Power, and Policy."

9. Young makes the interesting point that this formulation of the 1940s, when social science still aspired to be "value free," made this "policy orientation" important at the time (Young, "International Law and Social Science," 74-75, commenting on M.S. McDougal and H.D. Lasswell, "Legal Education and Public Policy: Professional Training in the Public Interest," *Yale Law Journal* 52 [1943], esp. 217-33). Yet it was out of step in the 1940s, as ironically it also seemed to be in the 1970s.

10. The clarity is too often obscured by such circularities as that international law is "a comprehensive process of decision, sustained by dispositions of effective power, which identifies certain decision-makers as authoritative for the whole community, prescribes the criteria by which decisions are to be taken . . . allocates important bases of power among the established decision-makers . . . and finally produces a flow of particular decisions . . . about the

In the case of many important international matters, there may be no decisionmakers in the law-making sense in which they are found in municipal societies. In a loose sense, there are, of course, as many separate sets of decisionmakers as there are states; but the "decision" must still wait for consensus in some sense of all these several decisionmakers. (It is only in certain marginal arenas of international governmental organizations that any precise analogy can be found to the law-making decisionmaker of a municipal social and legal order.)¹¹ It is around the point of transmutation of the multiplicity of national and transnational decisions into international *law* decision making that the more specific problems of a sociology of international law arise. But one effect of McDougal's transposition from the municipal to the international spheres is to push these specific problems almost completely out of view.¹²

In the sense in which McDougal defines it, on many matters international law probably does not have any general decision-making process yielding effective and authoritative decisions concerning distribution of values. Yet the fact that such a process is lacking on many matters is no reason to redefine international law in a way that makes unanswerable even the more straightforward questions of whether conduct is legal or not.¹³ It is shared ground, in short, to assert

shaping and sharing of the different values sought in the world power process" (McDougal and Reisman, "Unchanging Theory," 819-20, emphasis added). It is to be observed that the two italicized phrases cannot *both* mean what they say and imply. (There is a rather similar circularity in Fawcett's *Law and Power in International Relations*, 18, where he wishes with Hans Kelsen to identify a legal order by its overall effectiveness, while also saying that "confrontations between law and power bear on the effectiveness" of a legal order. Power must surely bear both on the "lawness" of law *and* on its "effectiveness.")

Cf. McDougal and Reisman, "Unchanging Theory," 820: "the continuous flow of decisions about various value processes which come out of the most comprehensive process may conveniently be called 'public order.'" Obscurity is further deepened by the multiple references elaborately stipulated for the term "decision." See McDougal, Lasswell, and Reisman, "Theories," 192, citing M.S. McDougal et al., "The World Constitutive Process of Authoritative Decisionmaking," *Journal of Legal Education* 19 (1967): 253, 415. These stipulated references embrace (1) access to intelligence data; (2) promotion, or advocacy; (3) prescription; (4) invocation, that is, characterization, of the issue; (5) application of the prescription; (6) termination; (7) appraisal of effectuation of public policies.

11. See on this special arena the valuable survey in L.B. Sohn, "The Growth of the Science of International Organisations," in Deutsch and Hoffman, *Relevance of International Law*, 251-69.

12. See Young, "International Law and Social Science," 63-64, on McDougal's use of social science notions of municipal origin, such as elites, leadership, power, social change, etc., in relation to current learning in social science.

13. As Young points out (*ibid.*, 65-66), it does not meet the problem in the text to refer to decisionmakers in subsystems or subcommunities. Even if McDougal precisely delimited all these, he would still have to find the "law" in some other group of unspecified deci-

that international decision making (including law making) ought to assure and elevate human dignity by conforming to human goals, values, or expectations. It is quite another thing, and not shared ground, that a precept offered as a precept of international law is not such until a certain relation of it to the furtherance of human dignity in the present global circumstances has been demonstrated to the satisfaction of indeterminate levels and ranges of decisionmakers. For this last position forecloses (by begging) the very questions of the relation of international law to human claims, aspirations, and expectations, which should be a main field of inquiry for the sociology of international law.

Moreover, as I have shown in preceding chapters, whenever state entities prevent reliable access to the human beings who people the various states, the extension of knowledge of the relation of the precepts of international law to the wants, aspirations, and expectations of human beings may be barred *ab limine*. Studies in other areas, for example, of the relation of international law to the activities of officials of various kinds and at various levels, remain feasible. McDougal's approach, however, peremptorily and rather strangely ignores the possible existence of this bar to knowledge of the human substratum.¹⁴ For him, the urgencies and intractability of the human situation under existing international law inspire "the formulation and implementation of an international law of human dignity." It is international *law* that he is to discover and proclaim to this end, not mere sociological knowledge concerning it.

The emergence of this international law involves the projection from Western municipal law onto the world stage of the "goals" of "human dignity and respect," embracing in these "power, respect, enlightenment, wealth, well-being, skill, affection, rectitude and sincerity," the study of "the participants in the world power process," and their techniques of policy formulation and decision making. The principal decisionmakers, filling more or less parallel roles in the "world power process," include international governmental organizations, transnational political parties and pressure groups, private associations, and individual human beings, along with nation states themselves.

Towards an understanding of international law and its sociological

sionmakers. For an enterprising inventory see G.A. Sumida, "Transnational Movements and Economic Structure," in Falk and Black, *Future of the International Legal Order*, 4:524-68. See also P. Allott, "Language, Method, and the Nature of International Law," *British Yearbook of International Law* 45 (1971): 129-31.

14. Strangely, since in McDougal, Lasswell, and Reisman, "Theories," 266 n. 270, McDougal does refer to my substantial thesis on this point.

substratum, the following points should be made concerning this whole program.

1. To the extent that McDougal does finally concern himself with the sociology of international law, he seems to treat it as a means, not of extending our range of cognition, but rather of equipping decisionmakers to operate the "world power process" in furtherance of his postulated common "goals" or "base values."

2. This know-how conceivably could be provided without extending the boundaries of knowledge or the relation of international law, and the goals pursued by its decisionmakers, to the claims, aspirations, and expectations of the world's men and women. It conceivably would be done, for example, by means of the know-how now emerging of the manipulation of human genetic endowment. Indeed, decisionmakers may be able to further the postulated "goals" by manipulating the "world power process" without knowing anything more than is implied in the goals about any human beings other than the other members of the elites who are the actors in the operative "world power process."

3. McDougal's aspiration is to embrace in the total "context" of his "comprehensive" system all the individual human beings who make up the populations of the various states. "The context," he says in his methodological article, "embraces all persons and groups who are in continuing interaction with one another." Further, "the important actors in community process, at all levels [are] individual human beings." These act through local, regional, and national communities or through the global community. These individuals affiliate with not merely nation states but "local territorial communities, international governmental organizations, political parties, pressure groups, tribes, families and private associations of all kinds." He chides colleagues no less than Max Huber, Charles de Visscher, and Percy Corbett for their more "constrictive notion of a community of States" and complains generally that the sociology of international law has not appreciated "the relevance of an anthropological view which comprehends the whole of man's cultural experience."¹⁵

The assumed heart of this "jurisprudence of international law," within which the sociology of international law is thus embraced but not distinguished, is "the interaction and interdependence of all indi-

15. Ibid., 269. McDougal does not advert to this main thesis of my Hague lectures of 1956 (Stone, "Sociological Enquiries," *passim*), which also inquired into the difficulties of acting on it.

viduals in the world," including their relations across frontiers. "Interdependence," which embraces communications (physical and human), includes interdependence of "cultures," interdependence of minimum security, and interdependence in pursuit of "every value which human beings covet." His theory, then, he believes, recognizes "the highly personal impact of all this interaction and interdependence upon the lives of individual human beings."

Even as he thus appears to enthrone human beings centrally in the "world power process," he hedges against the need for empirical attention to them by observing that the complexity and range of the world process may "dwarf, if not obliterate, the effectiveness of any one citizen." He then hedges against that hedge by supposing that the greater knowledge that his own inquiries would bring would allow individual participation to be more widely dispersed. As he stipulates the requirements for such participation by individual human beings, it becomes clear that they cannot be really satisfied before McDougal's "jurisprudence" of international law has already borne its fruits. But this means, of course, that the place of individual human beings in the sociology of international law, which is asserted to be fundamental, is pro tanto illusory. And in the end, Professor McDougal confesses that these are but impressionistic remarks about "the individual human beings' increasing role in and responsibility for world affairs." Even here he does not advert to the problems presented to his enterprise by the nationalization of truth and the role of state entities in this, as raised by me in the 1950s and here further discussed.¹⁶

4. In any serious effort to tie these matters into a sociology of international law, the postulated "*common* goals" must somehow be checked against the actual "goals" of the men and women who make up mankind. In other words, the operations and outcomes of the "world power process" would have to be checked for correspondence to people's actual claims, aspirations, and expectations. McDougal seems to imply this when he observes that "from the *perspective of scientific description* the individual human being is the ultimate actor in all arenas" (emphasis added). But he offers no serious answer to the question of how his comprehensive approach is to conform to this truth. While his strictures on such terms as "national interest" and "international interest" may be salutary, he seems less than candid about the difficulties of his own distinction (or lack of it) between "general community interest" (and related notions) as seen, on the one hand, by the

16. See above, chap. 1, and Stone, *Legal Controls*, xli-xliv, 321-22, 327-29.

observer and, on the other, by the members of the community. If, as in his text, the ultimate actors are assumed to be individual human beings, should not this assumption entail empirical checking as to what is the "general community interest" as seen by human beings in the actual world? And how does he propose to do this except through the eyes of observers? or indeed at all?¹⁷ In one breath, indeed, McDougal seems to chide the late W.G. Friedmann for his failure to check "values" against people's empirically found expectations and ambiguously declares international law to be a "process of authoritative decision making, in which the peoples of the world, in organised as well as unorganised interaction, clarify and implement their common interests with respect to all values." The word *peoples* is, indeed, a word for all seasons! In his own discussion of the relation of "authoritative decision" to "social process," there is no consideration of the problem of accessibility to empirical inquiry of the claims, aspirations, and expectations of individual human beings. Yet he also emphatically agrees with Friedmann that "respect for the human being . . . is a foundation of all social and therefore legal relations."¹⁸

Of course, this practical neglect accompanying theoretical emphasis on the meaning and impact of international law for human beings is often found among publicists. Among recent examples is James Fawcett's *Law and Power in International Relations* (1982). Fawcett sees typical "practitioners" concerned with the formation, execution, or support of policy, and so on, as ministers, diplomats, and their legal advisers. Despite the ambitious title of his book, Fawcett acknowledges that what he is providing is but "a description of how law and power work with and against each other in international relations" (9-10). Even then, he purports to present international law as law of a community of human beings (albeit "in an early stage of evolution"), in nations made up of "hundreds of thousands of crosscutting social roles" and confined by forces including law and power, so that he is suggesting that somehow the relations involved may be reducible in the end to those of individuals. But finally, at any rate, he has the frankness to conclude that only aggregate behavior can be adequately studied and that "structural features chosen to classify national actors are quite gross."

5. McDougal indicates little awareness, or at any rate concern, for the grave difficulties of checking "values" against people's empiri-

17. See McDougal and Reisman, "Unchanging Theory," 810, 813-15. See also below, n. 35.

18. McDougal and Reisman, "Unchanging Theory," 823-28, esp. 826, 835.

cally found expectations discussed in the preceding paragraphs and above in chapters 1 and 2. For as soon as this checking for correspondence is taken seriously, this part of the sociological enterprise is, I have shown, stopped short. It is stopped short by the difficulties, in most state communities, of saying how far official "decision making" is a response (and corresponds) to individual citizen attitudes and behavior or how far, on the contrary, these attitudes and behavior are mere responses to conditioning activities by official decisionmakers and are (above all) outcomes of each state entity's domination over its citizens. In the field of international law, as I have suggested above, this difficulty may amount to virtual impossibility.

McDougal himself notes in his Hague lectures¹⁹ his own earlier comments on the "movements towards 'garrison-police' States . . . with increasing militarisation, governmentalisation, centralisation, concentration and regimentation, and in which all values other than power are 'politicised', in such practices as . . . the 'requisitioning of talent and skill', the 'administration of hate' and 'withdrawal of affection', the 'requisitioning of loyalty', the 'dogmatisation and ritualisation' of rectitude, and so on." Yet he does not advert to the obstacles to basic sociological inquiry, and to his own program, that this state of affairs brings with it.²⁰ For him it merely signals the urgent need for a grand plan for promoting "an international law of human dignity" which must rest on "the plenum of social reality."²¹ And it is perhaps characteristic that when McDougal insists on the "relevance of the total world community context," he invokes the classic natural law vision of Francisco Suarez, not empirical studies of twentieth-century men and women.

Our world, however, is not that of the sixteenth century. And we are not entitled after this lapse of time automatically to identify what seems ultimately right, or even what is right as a next step towards ultimate right, with what is feasible at the present stage of history. As Richard Falk has pointed out, the implicit confused identification of the sociology of international law with international law itself, which

19. McDougal, "International Law, Power, and Policy," 138-39, citing Lasswell, *The World Revolution of Our Time*.

20. There is a similar inadvertence in McDougal, Reisman, and Lasswell, "The World Constitutive Process of Authoritative Decision," and in H.D. Lasswell, "Future Systems of Identity in the World Community," in Falk and Black, *Future of the International Legal Order*, 4:1-31. This matter of sociological inaccessibility is, of course, different from the much canvassed questions about individuals as bearers of rights and duties under international law. See, for example, H. Baade, "Individual Responsibility," in *ibid.*, 291-327.

21. McDougal, Reisman, and Lasswell, "The World Constitutive Process of Authoritative Decision," 73-154, esp. 74, n. 1.

has the effect of intruding the world context into each particular decision, prevents uniform application and is incongruous with the nature of any but the most "primitive" law.²² This confusion is not clarified by McDougal's introduction of the notion of "world public order." As Young observes, McDougal swings in his use of this term between meaning (a) the processes protected by the patterns of legal decisions, that is, of the "effective" and "authoritative" decisionmakers, and (b) the maintenance of international peace. Neither of these is different from the loose usages in general currency. "It is hard to see any uniquely legal element, point of view or methodology embedded in the phenomenon of world order itself, unless the whole notion of world order is simply absorbed into the category of legal analysis by definitional fiat."²³ I would add that fiat alone cannot clarify the relation between international law and world public order. Social systems, especially primitive ones, moreover, may have order without law, even in the decision-making sense. International law may be such a "primitive" social order.

James Fawcett has recently reached a similar collapse of international law into its social, political, and economic matrix, proclaiming international law to be "a product of authority, influence and coercion, national interests and common objectives, and . . . the outcome of all of them together." From a mountain of General Assembly resolutions, for example, he concludes that "the authority of the General Assembly in declaring rules or standards which *can* serve a clear and accepted common *interest* of nation-states, is reasonably high, but is low where there are conflicts of interest between them." We are not told how the "common interest" (singular) of states is related to "national interests," which Professor Fawcett also insists "are for any nation-state *multiple*."²⁴

How this can help in determining legal matters is also not clear. But from this and other studies in Fawcett's volume on power frontiers, economic power, human rights, and the like, Fawcett feels able to present the following conclusions. First, legislators and their constituents "may not be much concerned with law." Second, while practitioners such as "ministers, diplomats and their legal advisers" may have to be more or less "legalistic," this may not necessarily mean genuine appeal

22. R.A. Falk, "The Adequacy of Contemporary Theories of International Law: Gaps in Legal Thinking," *Virginia Law Review* 50 (1964): 231-65, esp. 234-35, hereinafter cited as Falk, "Contemporary Theories."

23. Young, "International Law and Social Science," 70-72.

24. Fawcett, *Law and Power in International Relations*, 47 and 41, respectively.

to law but may be a mere tactical use of law and (between the two) appeal to law as a public relations measure or as a basis for further negotiations. Third, judges and arbitrators have the somewhat different function of identifying and applying the law or deciding *ex aequo et bono*, though, if anything, jurisdiction of such organs has decreased since 1939, despite a fivefold increase of states since that time. Thus, Fawcett seems finally to conclude, "the authority" of international law is not as rules but as part of processes of cooperation, exchange, and conflict. While states have some common interests in predictability, these do not have a constant pattern. "In sum, law cannot itself create order in international relations but emerges as a fact of life where there are minimum degrees of order, which it may serve to rationalize and extend."²⁵ This cautious assertion shares some of McDougal's merger of law into sociological speculation, though this is mitigated by its avoidance of either utopian or scientific pretension.

6. In view of such objections, it may seem necessary to explain how, in a number of major works on, for example, the international law of use of force, the law of the sea, interpretation of agreements, human rights, and the law of space, McDougal was apparently able to expound international law in terms of his "process of decisionmaking."²⁶ The explanation lies, I believe, in the fact that while in his analysis he takes cognizance (more or less) of empirical data concerning the parallel decision making of officials of state entities, international governmental organizations, transnational political parties, pressure groups and private associations of all kinds, and also, ostensibly, individual human beings, the empirical facts marshaled concerning the participation by individual human beings are, to say the least, shadowy. McDougal might say, perhaps, that individual human beings "participate," at any rate passively, insofar as they are the beneficiaries of the values of "power, respect, enlightenment, wealth, well-being, skill, affection, rectitude and sincerity" to which he requires all decisionmakers to give effect in their decisions. Yet these values them-

25. *Ibid.*, 48-70, 80-90, 117-19.

26. See M.S. McDougal, H.D. Lasswell, and I.A. Vlasic, *Law and Public Order in Space* (New Haven: Yale University Press, 1963); M.S. McDougal and F.P. Feliciano, *Law and Minimum World Public Order: The Legal Regulation and International Coercion* (New Haven: Yale University Press, 1961); M.S. McDougal and W.T. Burke, *The Public Order of the Oceans: A Contemporary International Law of the Sea* (New Haven: Yale University Press, 1962); M.S. McDougal, H.D. Lasswell, and J.C. Miller, *The Interpretation of Agreements and World Public Order* (New Haven: Yale University Press, 1967); M.S. McDougal, H.D. Lasswell, and L.C. Chen, "Human Rights and World Public Order: Human Rights in Comprehensive Context," *Northwestern University Law Review* 72 (1977-78): 227.

selves, much less particular versions of them, are not presented by him as validated by empirical inquiries in the substratum of international law, but seem to be introduced rather *ab extra scientiam*.

That the vision of values controlling the "world power process" is an instrument for guiding decision-making elites rather than extending knowledge is not inconsistent with his translation of important branches of international law into these terms. It is well observed that the main principles of international law, even as traditionally approached, are problematic or indeterminate to an unusual degree. The introduction into them of further indeterminacies from a plurality of unranked levels of decisionmakers additional to states, seeking to realize rather indeterminately stated and frequently conflicting goals or values,²⁷ may change the language of exposition. What the resulting change in substance may be and whether the appropriateness of such change could be confirmed by empirical evidence are left in doubt by the preexisting uncertainties of outcome in any case affecting principles of international law.

Young has made the stern comment that the concepts, methods, procedures, and so on, of McDougal's approach provide clear "order of march" into any specific legal topics, and "systematic applications of the apparatus to specific topics produce large tomes that tend to display the characteristics of outlines or agendas for additional research, despite their bulk." He adds that sweeping formulations like "world public order" or "human dignity" may make very important and difficult problems of conflicts of goals rather invisible.²⁸ Certainly, McDougal has proposed the induction into the materials of international law of a rather imprecise range of decisions hitherto neglected. His work may thus promise contributions to the data of the sociology of international law. To what extent new data of this kind will illuminate the outcomes of that law for the human population of the planet, or the impact on

27. Compare the vast indeterminacies from McDougal's rebuke to the late W.G. Friedmann for lack of understanding of "an unorganised process of decision" (McDougal and Reisman, "Unchanging Theory," 820) and from his distinction between a "lower" and "higher" degree of a perceived common interest (*ibid.*, 829). Indeed, if the effect of the impenetrable indeterminacies, circularities, and empirical unfalsifiabilities of the approach here noted is taken into account, the uncharitable might say that the words used by McDougal against Friedmann's *Changing Structure of International Law* (New York: Columbia University Press, 1964), that its results are "*post hoc* and anecdotal," could apply to McDougal's own exposition (McDougal and Reisman, "Unchanging Theory," 832). The anecdote is obviously, however, writ very large, indeed in complicated epic. I entirely agree with R.A. Falk, "Contemporary Theories," 239-41, on "the false issue of complementarity of legal norms" that allows the theorist to have it all ways.

28. Young, "International Law and Social Science," 69-70, 73.

that law of the empirically found claims, aspirations, and expectations of that population, is quite problematic.²⁹

7. There seems to be little empirical evidence, in the generation after the doctrinal elaboration and application of international law as "policy-oriented decision-making" in "the world power process," of any improvement in performance of various decisionmakers in realizing McDougal's own postulated goals or values.³⁰ The skeptic could say that in major respects the empirical evidence is in the opposite direction. In the world since the emergence of the United Nations and of the McDougal-Feliciano blueprint for international control of use of force,³¹ the cases of major armed hostilities (neither controlled nor even stigmatized as aggression) passed one hundred by 1970 and are now well into the second hundred.³² Despite massive work by McDougal

29. There is a formidable attempt to apply the goals in a specific area in B.H. Weston, "International Law and the Deprivation of Foreign Wealth," in Falk and Black, *Future of the International Legal Order*, 4:36-182. Weston has to add, even then, that the decisionmaker does not escape from final "creative choice," though the method "illuminates the choices" that are "open," assuming "commitment to truly genuine community policies" (182). The extraordinary phrase "truly genuine community policies" is eloquent of the uncertainty of criteria for such policies.

30. The late W.G. Friedmann observed in 1971 that "instead of any trend towards a gradual transfer of national prerogatives to worldwide international authority, the national state remains not only the major focus of national allegiance, but the basic unit of international law and the power center of international society" ("The Reality of International Law: A Reappraisal," *Columbia Journal of Transnational Law* 10 (1971): 55 ff.). Cf. Friedmann, "U.S. Policy and the Crisis of International Law," *American Journal of International Law* 59 (1965): 856-71, esp. 870-71; and the no less sober views on various areas in T.J. Farer, "Law and War," in Falk and Black, *Future of the International Legal Order*, 3:15-78, esp. 76-78. See also D. Wilkes, "Territorial Stability and Conflict," in *ibid.*, 165-209; W.B. Bader, "The Proliferation of Conventional Weapons," *ibid.*, 210-23; A. Kramish, "The Proliferation of Nuclear Weapons," *ibid.*, 224-51; H. Feiveson, "Arms Control and Disarmament," *ibid.*, 336-69, esp. 337-56, 368-69; R.J. Barnet, "Towards the Control of International Violence: The Limits and Possibilities of Law," *ibid.*, 370-91, esp. 386-91; and G. Schwarzenberger, *The Dynamics of International Law* (Abingdon: Professional Books, 1976), 77-90, esp. 90, and 110-29. Schwarzenberger perhaps overstates the matter in declaring that the United Nations, like the old League of Nations, is an "inter-war" order rather than an "order of peace" and that even a real "international law of coordination" only operates in fleeting moments of natural catastrophe *other than war* (116). But the point of E.B. Haas ("Collective Security and the Future International System," in Falk and Black, *Future of the International Legal Order*, 1:226-316, esp. 227-38) seems quite unanswerable: "The U.N. . . . will be a reconciliation system unable to carry out the collective security task as well as does the current [1969] U.N. . . . If the Security Council harbours the danger of big power dominance, the General Assembly hides the peril of flabby majorities without the collective will to act" (316).

31. See McDougal and Feliciano, *Law and Minimum World Public Order*.

32. See generally R.A. Falk, "Beyond International Relations," the second of the Arthur F. Yencken Memorial Lectures, in *Statecraft in an Era of World Order, Delay and Renewal*; Australian National University (1974), 39.

and his colleagues on the law of the sea,³³ what the Third United Nations Law of the Sea Conference has secured in terms of their postulated goals, after unprecedented series of great sessions, still remains, as 1984 opens, to be seen. It has, however, brought into additional doubt and chaos much law that was long regarded as settled.³⁴ And the relation of outcomes still hoped for to the "power, respect, enlightenment, wealth, well-being, skill, affection," and so on, of the men and women of the planet rests rather in conjecture.

As to the law of human rights, which McDougal has also announced in a "comprehensive context" of "world public order,"³⁵ there can have been few generations of the modern era in which human rights have been more constantly, savagely, and ubiquitously violated.

8. Despite the constant pretensions of empirical inquiry, the reality emerges that contrary to first appearances, the "policy-oriented . . . world power process" approach has found no way through the impasse presented by the state's control of human communication across frontiers to the pursuit of empirical knowledge about the relation of international law to the human level of its sociological substratum.³⁶ It has perforce had to substitute for empirically found claims, aspirations, and expectations of human beings of the world the views of various elite decisionmakers, especially bureaucratic elites of states and international governmental organizations and, presumably also, observers like McDougal himself, as to what these "common" claims, aspirations, and expectations are. The fact that more traditional international lawyers indulge similar misleading pretensions when they identify a state with its people does not excuse McDougal's more ambitious claims.³⁷

33. McDougal and Burke, *Public Order of the Oceans*.

34. For balanced overviews see L.F.E. Goldie, "The Management of Ocean Resources: Regimes for Structuring the Maritime Environment," in Falk and Black, *Future of the International Legal Order*, 4:154-247; and in McDougalian terms, W.T. Burke, "Ocean Sciences, Technology, and the Future International Law of the Sea," in *ibid.*, 2:182-264. Cf. Falk, "Beyond International Relations," 31. But see now P. Allott, "Power Sharing in the Law of the Sea," *American Journal of International Law* 77 (1983):1-30, for a somewhat sanguine effort to present the outcome of the mountainous labor of the Third U.N. Conference on the Law of the Sea as an example of how states "are appointed as representatives of the international community as a whole by the international legislator who confers powers on them and thereby recognises the world's self government" (27). See below in this same chapter and n. 44. For the final act of the conference see *International Legal Materials* 21 (1982): 1245, and on the Convention on the Law of the Sea see *ibid.*, 1261. See also below, chap. 11.

35. See McDougal, Lasswell, and Chen, "Human Rights and World Public Order."

36. See, for example, McDougal and Reisman, "Unchanging Theory," 818-19.

37. So L.C. Green speaks of law as "intended to facilitate the living together of individuals within a group" but rather quickly makes clear that the relevant group in international law is a group of states rather than of human beings (see L.C. Green, "The Nature of Inter-

The complaint has indeed arisen (in the field of municipal constitutional decision making), even among McDougal's adherents, that he seems to substitute the elites' views about people's "common" interests or values for empirical attention to the interests and values actually pressed by people. For example, J.J. Paust has called for attention by the decisionmaker to empirical data evidencing what expectations are shared by the community, rather than reliance on the decision-making elites' "clarification and implementation of the common interest."³⁸ So far as international law is concerned, where the empirical data as to expectations would involve thousands of millions of people governed by more than 160 state entities, McDougal could offer better reasons than in the municipal field for avoiding empirical inquiries and relying on the decisionmaker's (or his observer's) more or less subjective view of the "common expectations" of the community. For it is impossible to see how, in the presence of the dominant state entities, the decisionmaker could overleap most of these entities, with their jealous control of communications, distribution, and stereotyping, to make even a rough empirical assessment of actual human expectations in the planetary community.³⁹

So far as "observers" à la McDougal are concerned, McDougal states quite explicitly that their tasks far transcend empirical observation. The insistent question, he says, must be: "What basic policy goals is [the observer] as a responsible citizen of the larger community of mankind or of various component communities, willing to recommend to other similarly responsible citizens as the primary postulates of world public order?" The "basic public order goals," he says, "must be explicitly postulated" by the observer, and for this reason he is a "participant." As I have shown, he lists the "goals" without claiming any more empirical evidence for them in human expectations than general references to national constitutions, human rights covenants, and self-evidence; at the same time, he denounces those who rely on "trans-

national Law," *University of Toronto Law Journal* 14 [1961-62]:176-93; for discussion of "modernist" trends then emerging, see *ibid.*, 179-89). On the de facto subjectivity of McDougal's international decisionmakers' operations with the "goals," cf. Falk, "Contemporary Theories," 234-35; S. Hoffmann, "The Study of International Law and the Theory of International Relations," *Proceedings of the American Society of International Law* [1963], 26, 33. Of course, McDougal does not intend this subjectivity (see *idem*, "Some Basic Theoretical Concepts . . .," *Journal of Conflict Resolution* 4 [1964]: 331).

38. See, for example, Paust, "The Concept of Norm," esp. 286 ff.: for examples there offered of McDougal's ambivalence on this crucial matter see *ibid.*, 287 and n. 233.

39. As called for in M.S. McDougal, *The Application of Constitutive Prescriptions: An Addendum to Justice Cardozo*, Benjamin Cardozo Lecture, Association of the Bar of the City of New York, New York, 1978.

empirical" or "highly ambiguous" derivations of goals. He seems unaware that his own postulations may show both faults. So also he chastises "historicalists" for basing themselves on "shared subjectivities" without checking them (I presume he means empirically checking) by reference to reaction among disparate groups. Yet, even granted "candid postulation" by those who follow him, are they not similarly proceeding (without empirical checking) on "shared subjectivities"? The subjective reality is not concealed by eloquent but abstract invocation of "human dignity" of "all men everywhere," implying a "wide rather than narrow" shaping and sharing of values, including power.⁴⁰

9. Before concluding, I must make reference to a number of semantic and methodological matters elegantly raised by Philip Allott concerning this McDougal school of thought.⁴¹ First, the "urgency of the style and nature of the argument" often leave the reader unwilling either to assent to or formulate a different view. Second, the "controlled intellectual confusion" of the presentation is no different from that of good traditional writing. Third, the McDougal approach is therapeutic in making it apparent that international law is not ready-made for instant application, rather than constructed in course of application. And construction requires attention to the respective claims and contexts of claims of the opponents. Fourth, the *apparent* relativism of this kind of work conceals its absolutism and subjectivism, to the point of "passionate" assertion, behind the constant use of such words as "fair, reasonable, right, incorrect, misleading, unfortunate, important, profound, vital, fundamental, of great significance, most desirable, arbitrary, intense, unnecessary, little justification, recommended, wholly adequate and, above all, ought, should, may." Fifth, this approach offers not merely possible answers but the right answers, apparently on the basis of appealing to readers sharing the values imported by terms like those just listed.

Sixth, acceptance of the assertion, then, depends on whether McDougal's values are shared; and if they are not, it depends on whether he can demonstrate rather than assert the value or the preferability of one or other of the conflicting values. Seventh, if the McDougal value-criterion is taken to be a fervent "international utilitarianism," it would be unfortunate to treat it (as he does) as a criterion *for finding international law* to be used by those applying law in day-to-day conflicts, *inter alia*, because it would lend itself readily to Marxist or power-political

40. McDougal, Lasswell, and Reisman, "Theories," 206-7, 232-33, 298.

41. Allott, "Language, Method, and the Nature of International Law," 116-17, 121-31.

interpretations and because it downgrades the relevance of past experience. Finally, if law finding in every case "is laid open to an explicit battle of interests and values, who then is to be master? Or . . . is the finding of the law to become an endless, actual or simulated process of negotiation?"

It will be apparent that all of these points except the third represent criticisms, sometimes rather severe, of main positions of McDougal's "policy science." Indeed, as recently as 1982, Rosalyn Higgins, the most notable British international lawyer to associate herself with those positions, found it necessary to attempt a defense against these criticisms of Philip Allott.⁴² Rather more surprising than this are the contents of the paper that Allott presented to the British branch of the International Law Association on 15 May 1982, entitled "Power Sharing in the Law of the Sea," for Allott's own presentation of this subject matter utilizes many, if not most, of the features of "policy science" thinking on which he had stringently (and cogently) commented a decade before. Allott does not explicitly abandon these earlier criticisms, though he does observe that the "rationalistic naturalism of some modern international law theory [such as McDougal's] may be more of a coherent underlying ideological structure, however dimly perceived by the participants in international society, than is normally supposed."⁴³

The 1982 positions were taken incidentally to an account of the Convention of the Law of the Sea opened for signature at the end of 1982. Their professed purpose "is to suggest a particular and unified structure of ideas within which the significance of the Convention may be perceived as a whole," which also bears upon "the significance of its individual provisions," as well as "our general perception of contemporary international law and society." If this undertaking were intended only as a socioeconomic, political, and ideological study of the momentously laborious negotiatory process from which the Convention of the Law of the Sea emerged, it would not be subject to comment in the light either of Allott's own 1971 positions or of my own position. Unfortunately, the paper at a number of points offers approaches to problems, and language for discussing them, that are indistinguishable from those that face arbitrators, judges, or other practitioners who will have to interpret its complex provisions. And indeed Allott is bold enough to suggest at one point that the insight he provides has contrib-

42. "The Identity of International Law," in Bin Cheng, ed., *International Law: Teaching and Practice* (1982), 38-42.

43. That paper was also the basis for an article with a similar title (see above, n. 34).

uted to the solution of a list of some of the most intractable legal problems of the *fin de siècle*, namely:

- the recognition of states and governments
- the right of self-defense
- the imposition of trade and other sanctions not under Security Council authority
- the expropriation of foreign property and investments
- the transnational protection of industrial property rights
- interstate weapons supplies
- the determination of matters within the domestic jurisdiction of a state
- the military use of outer space
- the application of the principle of *jus cogens* to treaties
- the determination of so-called international crimes (including aggression) otherwise than by decision of the Security Council
- the exercise of criminal jurisdiction (including the so-called effects doctrine and extradition, political offenses, and political asylum).⁴⁴

All the problems here canvassed become graver when it is recalled, in conclusion, that McDougal's indicia for "authority" of an international decisionmaker are at least indeterminate and possibly circular. He suggests that decisionmakers who have "effective power" supported by threats of "severe deprivations," and so on, manifested by "frequencies" [presumably of application] are "authoritative" but that this does not include "sheer naked power" or "naked power." (And when is nakedness not sheer?) Yet in the same exposition, he ventures to criticize H.L.A. Hart for offering "no means of protection against the error of mistaking pretended authority for power that is both authoritative and controlling."⁴⁵ Should this question not finally be directed to his own position?

44. Ibid., 27. Other examples in the article are too numerous to mention. I select only one on a matter of which I, as well as Allott in 1971, was very critical of the "policy science" position. Allott now finds as "a novel and fruitful idea" the International Court majority's words in the *North Sea Continental Shelf Cases* (*International Court of Justice Reports*, 1969, 46), that the laissez-faire treatment of the living resources of the high seas is now replaced by "a duty to have regard to the rights of other States and needs of conservation for the benefit of all." So that, says Allott, "the Rule of Law" of which the essence is "the actualisation of the general interest" (26-27), and the limitation of all "law" and "powers under law" to the function of "serving the interests of society" (27), now applies to international law both customary and treaty. Without clarifying (any more than does "policy science") the reliable methods of finding "benefit to all" or "the interest of society" and of reconciling the conflict within and between values constantly involved, he is able to proclaim that this "true significance of much of the LOS Convention" will assist us in meeting such grave legal problems as those quoted in the text!

45. McDougal, Lasswell, and Reisman, "Theories," 192, 201, 283, 253.

10. In view of the preceding difficulties, we need mention only briefly the questions concerning aptness for the sociology of international law of the particular elements of what McDougal is always concerned to call the "configurative" approach based on the thinking of the lamented Harold Lasswell. In Young's view, for example, Lasswell's "configurative elements" (participants, perspectives, arenas, values, strategies, outcomes, and effects) and his list of values and sevenfold classification of decision elements, relied on by McDougal, constitute only one of a number of divergent and competing available social science frameworks. In Young's view, these elements only help McDougal's approach by providing concepts, which are then not used to expand knowledge in social science. These conceptualizations, he adds, have been a mixed blessing, since they have "done more than anything else to alienate lawyers and legal scholars." On these points, especially the last, I feel compelled to agree.⁴⁶

46. See Young, "International Law and Social Science," 67-68. For Lasswell's late summation of the elements of his methodology see Lasswell, "Future Systems of Identity in the World Community," in Falk and Black, *Future of the International Legal Order*, 4:1-31.